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Supreme Court, U.S.
FILED
NOV - 5 2010
OFFICE OF THE CLERK

No. 10-31

In The

Supreme Court of the United States

ANA BOATWRIGHT,

Petitioner,

v.

ELLIOT D. RAY,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

REPLY TO BRIEF IN OPPOSITION

J.B. VAN HOLLEN
Attorney General

KATHERINE D. LLOYD
Assistant Attorney General

JEFFREY J. KASSEL*
Assistant Attorney General
**Counsel of Record*
P. O. Box 7857
Madison, WI 53707-7857
(608) 266-2340
kasseljj@doj.state.wi.us

Attorneys for Petitioner

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28 U.S.C. § 2254(d)(1) 1

The Antiterrorism and Effective Death Penalty Act (AEDPA), 28 U.S.C. § 2254(d)(1), prohibited the United States Court of Appeals for the Seventh Circuit from holding that the Wisconsin state court's application of *Tennessee v. Street*, 471 U.S. 409 (1985), was contrary to, or an unreasonable application of, federal law. Here, because the Seventh Circuit wholly failed to apply AEDPA standards to the state court decision at issue, the court exceeded its authority under federal law.

I. THIS COURT'S REVIEW OF VIOLATIONS OF AEDPA STANDARDS DOES NOT DEPEND ON A SPLIT AMONG THE CIRCUITS NOR ON A MATTER OF "ONGOING SIGNIFICANCE."

Ray urges the denial of the petition for certiorari because the circuits have not split on the legal issue in this case and this case is *sui generis*.[1] (Br. in Opp. at 8-12).

Neither a circuit split, nor an inquiry into how many parties would be affected by a decision, is a prerequisite for this Court to grant certiorari in an

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[1] The State disagrees with Ray's assertion that "all new habeas cases are reviewed under *Crawford* [*v. Washington*, 541 U.S. 36 (2004)]. The State frequently responds to habeas petitions in which the prisoner's conviction was final before *Crawford*. Properly filed postconviction motions toll the AEDPA limitations period, making pre-*Crawford* cases not uncommon.

AEDPA case. This Court has repeatedly granted certiorari when federal appellate courts have declined to abide by the limitations set forth in AEDPA, regardless of whether the federal circuit courts have split on the underlying legal issue or on whether a great number of parties would be affected by a decision. *See, e.g., Schiro v. Landrigan*, 550 U.S. 465 (2007); *Rice v. Collins*, 546 U.S. 333 (2006); *Bradshaw v. Richey*, 546 U.S. 74 (2005) (*per curiam*); *Holland v. Jackson*, 542 U.S. 649 (2004) (*per curiam*); *Middleton v. McNeil*, 541 U.S. 433 (2004) (*per curiam*); *Mitchell v. Esparza*, 540 U.S. 12 (2003) (*per curiam*); *Woodford v. Viscotti*, 537 U.S. 19 (2002) (*per curiam*); *Early v. Packer*, 537 U.S. 3 (2002) (*per curiam*); *Bell v. Cone*, 535 U.S. 685 (2002).

Ray argues that not only is there no circuit split on the issue in this case, but the Seventh Circuit's decision "is in accord with many other circuits that have granted habeas relief in similar circumstances" (Br. in Opp. at 9). Ray then cites to several cases in which federal appellate courts, like the Seventh Circuit, have examined confrontation clause issues applying *Ohio v. Roberts*, 448 U.S. 56 (1980), and *Lilly v. Virginia*, 527 U.S. 116 (1999) (Br. in Opp. at 9-10). None of the cases that Ray cites appear to involve federal review of a state court decision that

relied upon *Street* in reviewing a defendant's confrontation clause claim.[2] The issue in this case is not whether the statements could be admitted under *Roberts* or *Lilly*, but whether the state court's application of *Street* ran afoul of § 2254(d)(1). *See, e.g.*, *Furr v. Brady*, 440 F.3d 34, 37-39 (1st Cir. 2006) ("The state appellate court's interpretation and application of *Street* to the Furr case readily passes muster under § 2254(d)(1)").

Ray also argues that this Court should deny certiorari because his case involves "dead doctrine" (Br. in Opp. at 11). This argument ignores the fact that the State is not asking this Court to grant certiorari to develop or clarify confrontation clause law. The State asks this Court to grant certiorari because the Seventh Circuit, like the circuit courts in this Court's cases listed *supra*, failed to comply with AEDPA's limits on federal power.

Despite the well-known circumstances under which a federal court may grant habeas relief, the Seventh Circuit ignored the mandates of AEDPA and refused to offer any deference to the state court's application of federal law. Instead of analyzing how the state court reached its decision finding Ray had failed to show plain error, the Seventh Circuit determined that the state court's analysis was unreasonable because the federal case on which the

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[2] *Brown v. Dugger*, 831 F.2d 1547, 1551 (11th Cir. 1987), concluded that the State's *Street* argument, made for the first time on appeal, did not satisfy the confrontation clause because at trial, the prosecution admitted the statements for their truth and had relied upon the them for their truth.

state court relied was "distinguishable" from Ray's case.

AEDPA creates a highly deferential standard for federal review of state-level criminal convictions and further identifies this Court's interpretations of federal law as the benchmarks for implementing that standard. *Renico v. Lett*, 130 S. Ct. 1855, 1862 n.1, 1865-66 (2010). Here, the Seventh Circuit substantially disregarded those strict standards. That disregard warrants this Court's review.

II. THE SEVENTH CIRCUIT FAILED TO COMPLY WITH AEDPA'S STANDARDS FOR REVIEWING A STATE COURT'S ADJUDICATION OF A CRIMINAL CASE.

Ray's argument that Myles' and Townsend's "statements were plainly hearsay," misses the point at issue (Br. in Opp. at 15). Before granting habeas relief, AEDPA requires a federal court to show how the state court unreasonably applied a clearly established federal law as determined by this Court,

or how the state court decision was contrary to federal law.[3] The Seventh Circuit failed to do so.

A. Ray Mischaracterizes The Facts Of His Case.

As a preliminary matter, the State asserts that Ray's statement of the case and argument mischaracterize the facts in this case. The State seeks to clarify these misstatements.

1. Ray states that he has "consistently maintained that he withdrew from the conspiracy" (Br. in Opp. at 3). This is not true. For approximately the first thirty to sixty minutes of his interview with police, Ray denied any knowledge of the crime whatsoever (Dkt. 25 at SA641-42). Later, he told police, "Tell me which gun killed the girl and I'll tell you everything" (Dkt. 25 at SA653).

2. Ray states that no limiting instruction was given with regard to Phillips' testimony (Br. in Opp. at 5). While technically true, Ray fails to mention that he made no contemporaneous

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[3] It is not clear whether the Seventh Circuit found the state court decision contrary to federal law or an unreasonable application of federal law. In determining whether there was a confrontation clause issue, it appears the court concluded that the state court unreasonably applied federal law (A7). However, in the court's closing remarks, the court stated that the confrontation clause violation "resulted in a decision that was contrary to clearly established federal law" (A10). Under either standard, the State maintains that the Seventh Circuit misapplied AEDPA and exceeded its authority in doing so.

objection to the testimony, nor did he request a limiting instruction.

3. Ray states that "[i]n its closing argument, the State returned to its best evidence: the statements of Myles and Townsend" (Br. in Opp. at 5). While the State's closing arguments mentioned Myles' and Townsend's statements, they were clearly mentioned only to emphasize Ray's reaction to them. The closing argument is clearly centered around Ray's own inculpatory statements, which appear to place him at the scene of the crime (Dkt. 25 at SA865 ("Tell me which gun killed the girl"); SA866 ("Tell me which gun killed the girl, and I'll tell you everything"); SA869 ("Tell me which gun killed the girl, and I'll tell you everything")).

4. Ray states that there was a "dearth of evidence against" him (Br. in Opp. at 2). He argues that Myles' and Townsend's statements were the only evidence that placed him at the scene of the crime (Br. in Opp. at 19). This is not true. Ray's own inculpatory statements appear to place him at the scene, as well.[4]

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[4] It is strange that Ray argues that there was no evidence that placed him at the scene of the crime when his own statements certainly imply he was there and asserts that his statements could have been admitted as long as they were severed from Myles' and Townsend's statements (Br. in Opp. at 17-19).

B. The Seventh Circuit Decision Fails To Offer Any Level Of Deference To The State Court Decision At Issue.

Here, because Ray failed to object to Phillips' testimony at trial, the state court analyzed Ray's claim for relief under the plain error doctrine (A33). In Wisconsin, plain error review requires a defendant to show that a constitutional error occurred and the error was obvious (A33). The state court found that the case that most closely resembled Ray's case was this Court's decision in *Street*. In *Street*, this Court found that the confrontation clause is not implicated when a non-testifying co-actor's statements are admitted into evidence when those statements are not admitted for their truth. *Street*, 471 U.S. at 413-17. In this case, the state court concluded that Myles' and Townsend's statements, submitted into evidence through Phillips' testimony, were like the statements admitted in *Street* (A32-A35). The statements were not offered for their truth, but to put into context Ray's inculpatory statements in reaction to them (A33-A35). Because the statements were not offered for their truth, they were not hearsay and did not violate Ray's confrontation clause rights (A32-A35). Therefore, the state court concluded, Ray had failed to show plain error (A35).

Not only did the Seventh Circuit fail to offer any deference to this decision, the court wholly ignored the state court's decision. In fact, the portion of the

court's decision devoted to the hearsay determination barely makes mention of the state court decision at issue (A5-A8).[5]

The Seventh Circuit failed to acknowledge that because Ray did not object to the statements at trial, the state court was compelled to review Ray's claim only for plain error. The Seventh Circuit, therefore, was required to review the state court's decision with almost a double level of deference – Ray would have to show that the state court decision finding a lack of *plain error* was contrary to, or an unreasonable application of, clearly established federal law. Instead, after paying lip service to AEDPA, the Seventh Circuit essentially reviewed Ray's claim *de novo*. Without citation to any decision from this Court, the Seventh Circuit made the conclusory finding that "the hearsay violation was beyond dispute" (A5).

The Seventh Circuit implied that the state court should have applied *Roberts* and *Lilly* to Ray's confrontation clause claim (A8-A10). Because of this, it appears that the Seventh Circuit found that the state court decision, in applying *Street*, was contrary to this Court's clearly established law.

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[5] The decision's only reference to the state court decision in this section of the opinion refers only to the State's argument in support of it (A6-A7) ("The government maintains that the state court's conclusion that the co actors' statements were introduced to give context to Ray's reaction to them (i.e., a guilty reaction), not to show their underlying truth, is a reasonable conclusion and a reasonable application of federal law").

However, the Seventh Circuit decision also states that the state court's decision was unreasonable (A7). The State argues that the state court's reliance on *Street* instead of *Roberts* or *Lilly* was neither contrary to, nor an unreasonable application of, federal law.

1. Contrary to.

Neither *Roberts* nor *Lilly* addressed the situation at issue here: whether a co-conspirator's statement can be admitted when it is not introduced for its truth, but instead to show the defendant's reaction to the statement. The clearly established federal law that addresses this question is *Street*. Therefore, the state court's decision to analyze Ray's confrontation clause claim through the lens of *Street* cannot be contrary to clearly established federal law.

The state court was presented with the question of whether Phillips' testimony ran afoul of the confrontation clause when the co-conspirators' statements contained therein were introduced not for their truth, but to show Ray's inculpatory reaction to them. The state court then looked to *Street*, the only clearly established law from this Court to address such a question. Application of *Street* in this situation is not contrary to *Roberts* or *Lilly* because *Street* is the law from this Court that most closely fits the facts of this case.

2. Unreasonable application.

The Seventh Circuit failed to address, much less demonstrate, how the state court's decision finding no plain error is an unreasonable application of *Street*. The court did not offer any guidance as to how the state court went wrong in its application of *Street*. Instead, the Seventh Circuit merely stated that *Street* was "distinguishable" from the facts in Ray's case (A7-A8). Whether a Supreme Court case is distinguishable from the facts of a state court case has little to no import in an AEDPA case.

The Seventh Circuit stated that *Street* was distinguishable from Ray's case in two ways: (1) because in *Street* the co-conspirator's statements were introduced in rebuttal and not during the State's case in chief and (2) because in *Street* the court issued a limiting instruction (A8).

First, the fact that the statements were admitted during rebuttal in *Street* was not germane to this Court's holding that the statements were not hearsay. 471 U.S. at 413-14. The statements were not hearsay because they were not admitted "to prove what happened at the murder scene but to prove what happened when respondent confessed." *Id.* at 414. Introduction of the statements to explain the defendant's reaction to the statements "raises no Confrontation Clause concerns." *Id.* The inquiry into the purpose of the admission of the statements does not turn on when the statements were admitted

during the case, but on how the statements were used.

Second, *Street* cannot be distinguished based on the fact that a limiting instruction was not given because Ray failed to request a limiting instruction. Ray did not object to the statements admission at trial, nor did he move the trial court to instruct the jury that they should consider the statements for a limited purpose.

Further, Ray attempts to distinguish *Street* contending that, unlike in *Street*, the statements in his case were used to show what happened at the murder scene (Br. in Opp. at 21). This is simply not true. The statements were admitted, without objection, to show Ray's inculpatory reaction to them. It is clear from reading the record, particularly the State's closing argument, that the emphasis was on Ray's reaction to the statements, not on the statements themselves as any sort of substantive evidence of guilt.

For these reasons, *Street* is not meaningfully distinguishable from Ray's case. Even if the case were distinguishable, however, any distinctions do not rise to the level required before a federal court can reverse a state court conviction. The state court's application of *Street*, a decision from this Court that specifically addresses when a co-conspirator's statements can be admitted to explain the defendant's reaction to them, was reasonable.

It is clear from the Seventh Circuit's decision that it declined to provide any level of deference to the state court's findings, much less the level required by AEDPA. Without any analysis of the state court's decision, the Seventh Circuit blatantly ignored the law.

C. The Seventh Circuit Mistakenly Placed The Burden On The State To Show Ray's Trial Was Error-Free.

The Seventh Circuit and Ray repeatedly place the burden on the State to show how the statements at issue do not run afoul of the confrontation clause.[6] This is not the proper standard applied to cases before federal courts in AEDPA cases. It is Ray who must show that the state court's decision is unreasonable.

In finding that *Street* is distinguishable from Ray's case, the Seventh Circuit not only failed to apply the deference required by AEDPA, but it switched the burden from Ray to show how the state court's decision was unreasonable to the State to

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[6] For example, Ray complains that "the State has never explained why Ray's" inculpatory statements could not be severed from Phillips' recitation of Myles' and Townsend's statements (Br. in Opp. at 17-18). The State is under no obligation to make such a showing because whether the statements could be severed is not at issue. Moreover, the State has no burden of proof or production in a habeas case such as this.

show how the state court's decision could be supported. This burden-shifting is impermissible and is directly contrary to the law as set forth in AEDPA. The Seventh Circuit's decision repeatedly criticizes the State for its arguments in support of the state court's decision, but fails to offer any insight into how the state court's decision was unreasonable.

The Seventh Circuit's decision is the precise type of decision that this Court has held offends AEDPA and is impermissible. *See Lett*, 130 S. Ct. 1855. Essentially, the Seventh Circuit's decision amounts to a disagreement with the state court's finding; the court substituted its opinions for the state court's reasoned findings. Based on this disagreement, the court granted Ray habeas relief. But mere disagreement with the state court's decision is not enough under AEDPA to award Ray such significant relief. The state court decision must be *contrary* to, or an *unreasonable* application of, this Court's law before a federal court can grant relief. The Seventh Circuit's opinion failed to evaluate the state court's decision with regard to this high standard.

CONCLUSION

For the foregoing reasons, as well as those in the petition, the State respectfully requests this Court grant the petition for certiorari.

Respectfully submitted,

J.B. VAN HOLLEN
Attorney General

KATHERINE D. LLOYD
Assistant Attorney General
State Bar #1041801

JEFFREY J. KASSEL*
Assistant Attorney General
State Bar #1009170

Attorneys for Petitioner

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-2340
(608) 266-9594 (Fax)
kasseljj@doj.state.wi.us

Counsel of Record